No. 02-1646

In the Supreme Court of the United States

THE HIGBEE COMPANY, PETITIONER

v.

LYNETTE CHAPMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the "full and equal benefit" clause of 42 U.S.C. 1981(a) applies to the conduct of private entities that are not acting under color of state law.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The question presented in this case is whether the "full and equal benefit" clause of 42 U.S.C. 1981(a) applies to private conduct. Congress directly answered that question in 42 U.S.C. 1981(c), which provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination." Because the statute is so explicit, certiorari review by this Court is not warranted at this time. The conflict in the circuits is shallow and, in light of Section 1981(c)'s plain text, may not endure. In addition, the interlocutory character of the petition creates a significant likelihood that further proceedings on remand could render the question presented irrelevant to the outcome of this case.

STATEMENT

1. Section 1981 of Title 42, United States Code, provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Subsection (a) of Section 1981 was passed as part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, a statute that was designed to "secure[] for all citizens the 'same' rights as were 'enjoyed by white citizens' in a variety of fundamental areas." *Georgia* v. *Rachel*, 384 U.S. 780, 788 (1966). The category of rights protected by Section 1981 is "specifically defined in terms of racial equality." *Id.* at 791; see also *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982) (same). In 1991, Congress amended Section 1981 by adding subsections (b) and (c) to clarify the scope of

the rights that the Act guarantees. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072.[1]

2. a. While shopping at one of petitioner's department stores, respondent Lynette Chapman, an African American, entered a fitting room from which a Caucasian woman had just exited. Chapman noticed on the floor a sensor that is designed to prevent the shoplifting of clothes. After Chapman left the fitting room, a salesperson saw the sensor on the floor and, suspecting Chapman of shoplifting, notified a store security officer. Pet. App. 3.

The security officer was an off-duty sheriff's deputy. The record indicates that the sheriff's department and the department store had a close relationship. While working at the store, the deputy wore his official sheriff's department uniform and badge and carried his department-issued sidearm. Pet. App. 3. The sheriff's department posted for its officers notices of job openings at petitioner's department store. Departmental approval was required before an officer could work for petitioner, and the sheriff's department retained the authority to terminate the employment. *Id.* at 59. The sheriff's department required its officers, when working for petitioner, to follow the department's rules and procedures. In addition, at the time of the events at issue here, there was an annual written indemnity and hold harmless

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[1] Congress added subsection (b) in response to this Court's holding in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), that Section 1981 did not reach private acts of racial discrimination that occur after the formation of an employment contract, such as "breach of the terms of the contract or imposition of discriminatory working conditions," *id.* at 177. Subsection (b) now makes clear that Section 1981(a) protects against impairment on the grounds of race of a person's "enjoyment of all benefits * * * and conditions of the contractual relationship." 42 U.S.C. 1981(b); see H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 2 (1991); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 301-307 (1994). See generally *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1839-1840 (2004).

agreement between petitioner and the sheriff's department. *Ibid.* The department store's "Rules and Procedures for Security Personnel" provided that, in cases of suspected shoplifting, "[s]trip searches are prohibited," and "[i]f you suspect that stolen objects are hidden on [the shopper's] person, call the police." *Id.* at 3.

The officer stopped Chapman, and he and a female manager searched Chapman's purse. Pet. App. 3. The officer then directed Chapman to accompany the manager into a fitting room, where the manager required Chapman to remove her coat and suit jacket and to lift up her shirt. No department merchandise was found on Chapman's person or in her purse. *Ibid.* Chapman identified to the security officer and the manager the Caucasian woman who had preceded her into the dressing room, but that woman was not questioned or detained. *Id.* at 37, 99.

b. Chapman filed suit against petitioner under 42 U.S.C. 1981(a), alleging that petitioner's employees violated her right to "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." She also alleged, pursuant to 42 U.S.C. 1983, that petitioner violated her right to be free from unreasonable searches and seizures under the Fourth Amendment and her due process rights under the Fifth Amendment. Pet. App. 3-4.

The district court, acting through a magistrate judge by the parties' consent, granted summary judgment for petitioner. Pet. App. 98-108; see also *id.* at 110-120. The court dismissed Chapman's claim under Section 1981 on the ground that the "full and equal benefit" clause extends only to state action. *Id.* at 102-104. The district court also dismissed Chapman's Section 1983 claim on the ground that the security officer was not acting under color of state law. *Id.* at 106-107.

3. A divided panel of the court of appeals affirmed. Pet. App. 35-95. The majority agreed with the district court that the "full and equal benefit" clause of Section 1981(a) protects only against deprivations caused by governmental actors. The majority reasoned that, "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Id.* at 41. The majority also affirmed dismissal of the Section 1983 claim on the ground that the officer was acting "pursuant to his duties as a private security guard." *Id.* at 59. Judge Suhrheinrich concurred, Pet. App. 60-76, expressing his view that Section 1981(c)'s language providing that the rights guaranteed by Section 1981 are protected against both private and governmental discrimination could not be applied to the "full and equal benefit clause" because that would not accord with that clause's "ordinary and common meaning." *Id.* at 61.

Judge Moore dissented. Pet. App. 76-95. She considered the language of subsection (c) to be "perfectly clear" that the "rights" protected by subsection (a) "are protected against impairment by nongovernmental discrimination." *Id.* at 77 (quoting 42 U.S.C. 1981(c)). She also considered "logically flawed" the majority's premise that only the State can deprive an individual of the benefits of laws or proceedings, because, "[a]lthough the state does make the law, one private actor may deprive another of the full and equal benefit of those laws just as readily as a state actor." *Id.* at 80. She offered as an example the situation where a state law guarantees equal access to public facilities, but "private persons design to deny racial minorities access to such places through intimidation." *Ibid.*

4. The court of appeals granted rehearing en banc and reversed the panel opinion. Pet. App. 1-34. The en banc court held that the language of Section 1981(c), which states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination,"

unambiguously protects all of the rights contained in Section 1981(a) against discrimination by private entities. *Id.* at 6. The en banc court found nothing anomalous about the notion that private individuals could deny persons the equal benefit of the laws, noting that, in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), this Court held that an "analogous equal protection provision" in 42 U.S.C. 1985(3) applied to private action. Pet. App. 8. The court found "equivocal" the legislative history of Section 1981(c), which discussed the application of that section to private contracts, but was silent regarding its application to the other rights protected by subsection (a). *Id.* at 11. The court explained that Congress's "failure to comment upon statutory language simply does not constitute a rejection of the plain import of that language." *Id.* at 10.

The en banc court stressed that applying the plain meaning of Section 1981(c) would not federalize all state tort claims because "the language surrounding the 'full and equal benefit' clause serves to cabin both the number and nature of claims that may be brought." Pet. App. 12. In particular, the court noted that a cause of action arises under the statute only when a party denies another "the benefit of a law or proceeding protecting his or her personal security or a cognizable property right." *Ibid.* In addition, in order to prevail, plaintiffs would need to "prove intentional discrimination on the basis of race, which involves a high threshold of proof." *Ibid.*

Finally, the en banc court reversed the district court's dismissal of respondent's Section 1983 claim and remanded it for further proceedings. Pet. App. 13-18. The court found that there was a genuine issue of material fact regarding whether the security officer acted under color of state law when he asked Chapman to enter the fitting room with the sales manager for a strip search. The court noted that, because "Dillard's policy *mandates* police intervention in strip search situations, a reasonable jury could very well find that

the initiation of a strip search by an armed, uniformed sheriff's deputy constituted an act that may fairly be attributed to the state." *Id.* at 17.

Judge Suhrheinrich, joined by Judges Boggs and Batchelder, dissented. Pet. App. 2, 18-34. Relying on the Third Circuit's opinion in *Mahone* v. *Waddle*, 564 F.2d 1018 (1977), cert. denied, 438 U.S. 904 (1978), he would have held that "[a]n act by a private individual which violates the legal rights of another is not the equivalent of a deprivation of the full and equal benefit of the law violated." Pet. App. 24. He also contended that the majority's decision would have the absurd result of federalizing state tort law. *Id.* at 33.

DISCUSSION

Petitioner is correct (Pet. 12-26) that the courts of appeals have issued conflicting decisions on the question whether the conduct of private actors falls within the scope of Section 1981's clause protecting all persons against racial discrimination in the enjoyment of the "full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. 1981(a). The en banc Sixth Circuit here (Pet. App. 5-13) and the Second Circuit, in *Phillip* v. *University of Rochester*, 316 F.3d 291, 294-298 (2003), have squarely held that the "full and equal benefit" guarantee of Section 1981(a) protects against racial discrimination by private actors. The Eighth Circuit has held the opposite, concluding that the "full and equal benefit clause" applies exclusively to the conduct of governmental actors. *Adams* v. *Boy Scouts of America*, 271 F.3d 769, 777 (8th Cir. 2001).

Not every circuit conflict, however, merits this Court's immediate intervention and, in the view of the United States, the Court's review of the scope of the "full and equal benefit" clause of Section 1981 at this time is not warranted. Congress has already directly answered the question presented in the text of Section 1981. Section 1981(c)

provides, in straightforward terms, that all of the "rights protected by this section are protected against impairment by nongovernmental discrimination." The Sixth Circuit's decision here, as well as the Second Circuit's decision in *Phillip*, properly gave effect to that statutory directive. While the Eighth Circuit has held to the contrary, that court's abbreviated analysis simply hewed to precedent that predates Congress's enactment of subsection (c), without mentioning, let alone analyzing, the import of that amendment. Because the circuit conflict is shallow, there is no pressing need for this Court to resolve the question before the Eighth Circuit has had the opportunity to reconsider its position in light of subsection (c) and the intervening analyses of the Second and Sixth Circuits that rely on the plain import of that subsection. Finally, the interlocutory posture in which petitioner seeks this Court's review means that further proceedings on remand could render the question presented entirely academic.

1. The Decision Below Is Correct And Compelled By The Clear Terms Of Section 1981(c)

Determining the scope of Section 1981's protection "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, that is also where the inquiry should end. As the court of appeals recognized (Pet. App. 6), Section 1981(c) squarely provides that "the rights"—all of them—protected by this section [1981]" are protected against both governmental and "nongovernmental discrimination." 42 U.S.C. 1981(c). Congress thus already has answered the question presented in clear and straightforward language. There is no need for judicial construction to proceed further because "[t]here can be no construction when there is nothing to construe." *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867); see also *Bedroc*

Ltd., LLC v. *United States*, 124 S. Ct. 1587, 1593 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

The statutory structure reinforces the text's meaning. While petitioner posits (Pet. 22-23) that Congress intended only to codify Section 1981's application to private contracts, Congress's enactment of a separate and distinct subsection (c), with no limiting or qualifying language, points to the opposite conclusion. If Congress intended to refer only to private contracts, it likely would have employed the same limiting language it used in the simultaneously enacted subsection (b), which, by its terms, pertains exclusively to Section 1981's "make and enforce contracts" clause. Instead, at the same time it limited subsection (b) to the "make and enforce contracts" clause of Section 1981(a), Congress wrote subsection (c) in terms that apply to all of the "rights" protected by Section 1981(a). In other words, when Congress wanted to restrict one of the 1991 amendments to Section 1981's contract clause, it said so explicitly. The absence of such limiting language in the simultaneously enacted subsection (c) thus speaks volumes. See *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Petitioner and the dissenting judge in the Sixth Circuit offer three reasons why they believe the Sixth and Second Circuits' adherence to Section 1981(c)'s plain text is wrong. None of them withstands scrutiny.

First, petitioner (Pet. 22, 24) and the dissent (Pet. App. 21-22) argue that hewing to Section 1981(c)'s language would create "textual inconsistencies" (Pet. 22) because only state actors can deprive persons of the equal benefit of laws and proceedings. As an initial matter, that arguments rests on

the flawed premise that, because only state actors can be the source of laws, only state actors can deprive individuals of the equal benefits of those laws. But, while private actors may not be the source of laws, they still can deprive others of the equal benefit of those laws by, among other things, intimidation and violence. This Court made exactly that point in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). *Griffin* held that a companion civil rights provision protected against both governmental and private actions that "depriv[e]" persons "of the equal protection of the laws, or of equal privileges and immunities under the laws," 42 U.S.C. 1985(3). In words that speak directly to petitioner's argument, this Court explained:

> A century of Fourteenth Amendment adjudication has * * * made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.

403 U.S. at 97.

Indeed, the Court reasoned that Congress's "failure to mention" in the statutory text that private conduct was excluded was "an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." *Griffin*, 403 U.S. at 97. The Court also noted that Section 1985(3)'s reference to persons who "go in disguise" was "so commonly connected with private marauders" that the language must cover private conduct. *Id.* at 96. The Court then concluded that the other closely related clauses of Section 1985(3) could not be "read to require the involvement of state officers." *Ibid.* Here, the

language of Section 1981(c) is even more explicit about reaching private conduct.[2]

The dissenting judge attempted (Pet. App. 26-30) to distinguish *Griffin* by noting that Section 1985(3) expressly refers to the actions of "two or more persons" that deprive individuals of their equal rights under the law. *Id.* at 26. That is true, but it is a distinction that hurts rather than helps petitioner. If the somewhat ambiguous reference to "persons" who "go in disguise" is sufficient to establish that private actors can deny individuals the equal protection of the law, then Section 1981(c)'s provision, in terms, that "non-governmental" actors are covered must perforce be sufficient to the task.

Petitioner's other perceived "interpretive difficult[y] (Pet. 24)—that Section 1981(a)'s "like punishment" clause can only refer to state actors—fares no better. It requires no strain of the imagination to identify private entities, such as private schools, that impose "punishment" on individuals. That is particularly true in light of the evidence or private violence and intimidation before Congress at the time of Section 1981's enactment. See page 15, *infra*. In any event, even if petitioner is correct that the substantive scope of the "like punishment" or the "full and equal benefit" clauses, in practice, will rarely apply to the conduct of private actors, that would be a result, not of judicial inference of the very state-action element that Congress expressly foreclosed in

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[2] Petitioner's and the dissent's arguments, moreover, seize upon the "full and equal benefit" clause's reference to "laws" that provide "for the security of persons and property," which, they point out, only governments can enact. But Section 1981 refers both to "laws *and proceedings* for the security of persons and property" (emphasis added). It may be that private entities can establish "proceedings" to protect the safety and security of individuals. Cf. Pet. App. 3 (describing petitioner's "Procedures for Security Personnel" that, among other things, restrict the strip searches of customers).

subsection (c), but of judicial construction of what types of "punishments" Section 1981 encompasses and what it means to deny a person the "equal benefit" of laws or proceedings. While courts might ultimately adopt readings of those terms that most commonly embrace the conduct of governmental actors, that would not and, in light of subsection (c), could not mean that those clauses impose a state-action element or requirement in all cases as a matter of law. Whatever the ultimate reach of the "full and equal benefit" language, it seems clear that some private conduct, such as intimidation designed to deny an individual the equal benefits of facially neutral laws, is prohibited by Section 1981(a).

Second, petitioner (Pet. 22-23) and the dissent (Pet. App. 30-32) contend that the legislative history precludes adherence to Section 1981(c)'s text. Petitioner explains (Pet. 22) that a report from one House Committee stated that Section 1981(c) was intended to codify this Court's decision in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which held that Section 1981 prohibits acts of private racial discrimination in contracting. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 37 (1991). A report from another House Committee stated that Section 1981(c) "confirms Section 1981's coverage of both public and private sector employment." *Id.* Pt. 1, at 92.

That is a true rendition of the legislative history, but it does nothing to advance petitioner's cause. As an initial matter, it is unclear why petitioner considers assurances that Section 1981(c) means exactly what it says in the specific context of contracting as somehow evidencing Congress's intent to exclude other forms of private conduct. And the overall thrust of the 1991 amendments was to extend, not to limit, civil rights remedies. See H.R. Rep. No. 40, *supra*, Pt. 2, at 1 (an overall purpose of the 1991 amendments was "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective

deterrence and adequate compensation for victims of discrimination").

In any event, while a court may "refer to a statute's legislative history to resolve statutory ambiguity," *Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991), the Court has never held that ambiguous or silent legislative history provides a basis for disregarding clear and duly enacted statutory text.[3] Nor does petitioner's suggestion that Congress might not have foreseen a particular application of statutory text license the Court to judicially contract the law's operation. *United States* v. *Lorenzetti*, 467 U.S. 167, 179 (1984) ("[T]he fact that changing state tort laws may have led to unforeseen consequences does not mean that the federal statutory scheme may be judicially expanded to take those changes into account.").

Third, petitioner (Pet. 16-20) and the dissent (Pet. App. 32-34) express concern that enforcing Section 1981(a) and (c) according to their plain terms will result in federalizing tort law. The short answer is that such policy arguments are directed to the wrong forum. Plain statutory text that has been enacted by both Houses of Congress and signed by the President cannot be modified by this Court just because a party considers the law to be bad policy. "If an amendment to the statute is needed to deal with a problem that Congress did not foresee, it is Congress—not this Court—that must perform that task." *Ralston* v. *Robinson*, 454 U.S. 201, 233 (1981) (Stevens, J., dissenting); see also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 183 (1989) (while the Court

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[3] See *Bedroc Ltd.*, 124 S. Ct. at 1595 n.8 (declining "invitation to presume that Congress expressed itself in a single House Committee Report rather than in the unambiguous statutory text approved by both Houses and signed by the President"); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

is generally "'reluctant to federalize' matters traditionally covered by state common law," that reluctance "must" give way "when Congress plainly directs" such a result).[4]

In addition, this Court already rejected that concern in *Griffin*, when it explained that whatever "constitutional shoals * * * would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation"—intentional discrimination on the basis of race—that Section 1981(a)'s text already requires. 403 U.S. at 102; see *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993); see also *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 389 (1982) ("[Section] 1981 reaches only purposeful discrimination" on the basis of race.). That is an "exceedingly high standard" of proof, *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1998), which ensures that Section 1981 will not provide relief for routine "barroom brawl[s]" (Pet. App. 33). Section 1981's scope is further limited by the requirement that a plaintiff prove that he or she was deprived of the "full and equal benefit" of a "law or proceeding" and that the defendant "inten[ded] to deprive persons of a right guaranteed against private impairment." *Bray*, 506 U.S. at 274; see *id.* at 276 & n.6; see also *United Bhd. of Carpenters & Joiners of America* v. *Scott*, 463 U.S. 825, 833 (1983). As petitioner acknowledges (Pet. 19), those limitations already have re-

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[4] Petitioner does not argue that Congress lacks the legislative authority to apply the "full and equal benefit" clause to private conduct. Section 1981 was enacted pursuant to Congress's power under both the Thirteenth and Fourteenth Amendments, and the former specifically empowers Congress to regulate private conduct. *General Bldg. Contractors*, 458 U.S. at 389; *Runyon*, 427 U.S. at 179.

sulted in the dismissal of numerous claims brought under the "full and equal benefit" clause.

On the other hand, petitioner offers no sound reason why the same Congress that sought to protect newly freed slaves against refusals to contract and denials of housing based on race would have withheld a federal remedy for the brutal assaults and murders of African Americans, solely because of their race, that were occurring at the time of Section 1981's enactment. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427-428 (1968) (legislative history of Section 1981 included numerous "references to private injustices against Negroes," including "white citizens who assaulted Negroes") (footnote omitted); *Hawk* v. *Perillo*, 642 F. Supp. 380, 386-387 (N.D. Ill. 1986) ("full and equal benefit" clause provided basis for claim arising from a severe, racially motivated beating) (cited at Pet. App. 12 n.5). In that respect, when applied according to its terms, Section 1981(a)'s "full and equal benefit" clause complements 42 U.S.C. 1985(3)'s protection against conspiracies to deprive individuals of the equal protection of the law. When applied according to petitioner's terms, by contrast, Section 1981's "full and equal benefit" clause is redundant of the protection against actions taken under color of state law already afforded by 42 U.S.C. 1983. See *Griffin*, 403 U.S. at 99 (declining to restrict 42 U.S.C. 1985(3) to action taken under color of law because, in light of Section 1983, that reading would deprive Section 1985(3) "of all independent effect"). In short, there is no sound basis for concluding, as petitioner's and the dissent's analysis assumes, that the "broad language" of Section 1981 "was a mere slip of the legislative pen." *Jones*, 392 U.S. at 427.

2. The Circuit Conflict Is Not Sufficiently Developed To Warrant This Court's Review, Especially In Light Of Section 1981(c)'s Clarity

The circuit conflict is not sufficiently broad or well-developed to warrant review at this juncture. Only the Eighth Circuit has held that the "full and equal benefit" clause requires state action as an element of the claim. See *Adams*, *supra*; *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (2001), cert. denied, 535 U.S. 1017 (2002). In light of subsection (c)'s plain text, that conflict may not endure. Although the *Adams* and *Youngblood* decisions both postdate the 1991 addition of subsection (c) to Section 1981, the Eighth Circuit's abbreviated consideration of the issue in those cases does not even acknowledge the existence of subsection (c), let alone grapple with its implications. *Youngblood*'s two-sentence consideration of the scope of the "full and equal benefit" clause simply cites the since-overturned panel decision in the present case and dicta from a Third Circuit case that predates the 1991 amendment. See 266 F.3d at 855 (citing *Mahone* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978)). The Eighth Circuit's follow-on decision in *Adams*, in turn, simply quotes and applies *Youngblood*. 271 F.3d at 777.[5] Given the directness with which Congress has spoken in subsection (c), if the Eighth Circuit considers the scope of the "full and equal benefit" clause in light of the 1991 amendment and the well-reasoned decisions of the en banc Sixth Circuit and the Second Circuit in *Phillip*, *supra*, the Eighth Circuit may well

[5] While the dissent in *Youngblood* includes a block quote of the complete text of Section 1981, including subsection (c), 266 F.3d at 856 (Richard Arnold, J., dissenting), subsection (c) is never mentioned in either the majority's or the dissent's analyses. A Westlaw search has identified no other Eighth Circuit case that even cites, let alone discusses, Section 1981(c).

conform its law to that of the other circuits. The directness of the statutory text likewise makes it unlikely, in the interim, that any other circuit will follow the Eighth Circuit's lead.

Contrary to petitioner's contention (Pet. 13-14), the Third Circuit has not definitively sided with the Eighth Circuit's holding that the "full and equal benefit" clause captures only governmental discrimination on the basis of race. While that court said, in *Brown* v. *Philip Morris Inc.*, 250 F.3d 789 (2001), that "only state actors can be sued under the 'full and equal benefit' clause of § 1981," *id.* at 799, that statement was not necessary to the court's decision. The court prefaced its comment about the scope of Section 1981 with the holding that the plaintiffs had waived their claim under the "full and equal benefit" clause because it "do[es] not appear to have been raised in the District Court and no exceptional circumstances suggest review of such claims notwithstanding Black Smokers' failure to argue them previously." *Ibid.* The statement that governmental conduct is a component of a "full and equal benefit" clause claim accordingly was an aside, introduced with the qualification "even if we were to consider [it]." *Ibid.* Furthermore, the Third Circuit followed its dicta about the "full and equal benefit" clause with the holding that the plaintiffs' claims "are not * * * cognizable under §[] 1981" because they "remain fundamentally allegations of discriminatory advertising." *Id.* at 800. Because the plaintiffs' claim was neither cognizable under Section 1981 nor preserved for appellate review, the court's brief comment about the "full and equal benefit" clause's application to private actors was obiter dicta.

Petitioner's further reliance on the Third Circuit's decision in *Mahone*, *supra*, is misplaced for two reasons. First, and most importantly, the *Mahone* decision precedes by more than a decade Congress's 1991 amendment of Section 1981, which made explicit that the "rights protected by this

section are protected against impairment by nongovernmental discrimination." 42 U.S.C. 1981(c). Congress's express refutation in statutory text of *Mahone*'s dicta would unquestionably provide a sound basis for the Third Circuit to revisit the scope of the "full and equal benefit" clause in a case that squarely presented the question.[6]

Second, the *Mahone* case involved discrimination by police officers who indisputably were acting under color of state law at the time, 564 F.2d at 1020, 1029, and the court focused its analysis on Section 1981's "like punishment" clause, not the "full and equal benefit" clause, *id.* at 1029-1030. The court's comments about the application of the "full and equal benefit" clause to private conduct thus were dicta, as the court acknowledged. *Id.* at 1030 ("In the instant case, of course, the complaint does allege state action. Certainly the like punishment clause applies to such action. *We need decide no more in this case.*") (emphasis added).[7]

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[6] For that same reason, petitioner's argument (Pet. 14) that the Fourth Circuit has joined the conflict, based on a 1986 decision that this Court overturned in 1987, misses the mark. See *Shaare Tefila Congregation* v. *Cobb*, 785 F.2d 523, 525-526 (1986), rev'd on other grounds, 481 U.S. 615 (1987). That is not to suggest that, prior to the 1991 amendment, the "full and equal benefit" clause did not reach private conduct. To the contrary, this Court had repeatedly held that Section 1981 applies to private conduct. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171, 177 (1989); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 387-388 (1982) ("[T]he prohibitions of § 1981 encompass private as well as governmental action."); *Runyon* v. *McCrary*, 427 U.S. 160, 173 (1976) (stating, without qualification, that Section 1981 "reaches private conduct"); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); see also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

[7] Further evidencing that the *Mahone* court's statement about the scope of the "full and equal benefit clause was pure dicta is the fact that earlier parts of the opinion support the conclusion that private conduct is covered. Just a few pages before the dicta, the court cited with approval

3. This Case's Interlocutory Posture Further Counsels Against Review

An exercise of this Court's certiorari jurisdiction is also unwarranted because the case's interlocutory posture creates a significant likelihood that the question presented could have no effect on the outcome of this litigation. The Sixth Circuit remanded for further proceedings the question whether the sheriff's deputy, who was serving as petitioner's security officer, was acting under color of state law when he directed Chapman to submit to a strip search. Pet. App. 17-18. If, after further proceedings addressing this fact-intensive inquiry, the officer is found to have acted under color of state law, then the officer's actions could trigger liability under Section 1981 even under petitioner's reading of the statute.[8] The prospect that further proceedings will render questions of law either moot or irrelevant to the litigation at hand is one of the central reasons that this Court

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Central Presbyterian Church v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), a case where, in the *Mahone* court's words, "[t]he Equal Benefit clause" was applied to the private "defendants' interruptions of the Church's Sunday services." 564 F.2d at 1027. The *Mahone* court then went on to endorse that decision, stating that "[o]ur own examination of the language of section 1981 leads us to believe that its reach is as wide as these cases would indicate." *Ibid.* On the next page, the *Mahone* court stressed that Section 1981 was enacted pursuant to the Thirteenth Amendment and was intended "to eradicate *all* discrimination against blacks and to secure for them full freedom and equality in civil rights." *Id.* at 1028.

[8] See generally *Morris* v. *Dillard Dep't Stores, Inc.*, 277 F.3d 743, 747-751 (5th Cir. 2001) (discussing the case-specific factors to be considered in deciding whether a department store will be considered to have acted under color of state law based on the conduct of an off-duty police officer serving as a security guard). Petitioner identifies no reason why 42 U.S.C. 1981 would have a more cramped definition of state action than 42 U.S.C. 1983.

rarely grants review in cases arising in just such an interlocutory posture.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J.) (denial of certiorari on interlocutory appeal), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review after final judgment).